

THE HONORABLE JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YVETTE BAILEY,

Plaintiff,

vs.

ALPHA TECHNOLOGIES INCORPORATED,
a Washington corporation; ALTAIR
ADVANCED INDUSTRIES, INC., a
Washington corporation; ABC, Inc. 1-10,
defendant corporation(s) whose name(s) is/are
unknown; FREDERICK KAISER and "JANE
DOE" KAISER, and the marital community
comprised thereof; and GRACE BORSARI and
"JOHN DOE" BORSARI, and the marital
community comprised thereof,

Defendants.

NO. 2:16-cv-00727-JCC

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS CLAIMS PURSUANT
TO FED. R. CIV. P 12(b)(6), AND
IN THE ALTERNATIVE,
PLAINTIFF'S MOTION FOR
LEAVE TO AMEND THE
COMPLAINT PURSUANT TO
FED. R. CIV. P. 15**

NOTED: July 8, 2016

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NOTED: July 8, 2016

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff's complaint need only contain enough facts for the Court to draw reasonable inferences that the Defendants are liable for the misconduct alleged. The Supreme Court, Ninth Circuit, and Washington courts have all explained and reasoned that this simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. Defendants' motion, though, disregards this well-settled standard.

Plaintiff served the Defendants, Grace Borsari ("Borsari"), Frederick Kaiser ("Kaiser"), Alpha Technologies, Inc. ("Alpha"), and Altair Industries, Inc. ("Altair" formally G.B. Enterprises, Inc.) loyally for 26 years. During this time, in 2004, Alpha and G.B. Enterprises, Inc. were fined \$37.5M by this Court for tax fraud. In 2015, Plaintiff discovered invoicing changes that she suspected could be illegal. In an effort to prevent Defendants from again running afoul of the Internal Revenue Service, she reported the invoicing changes to Kaiser and Borsari. Soon thereafter, Plaintiff was fired on false and malicious grounds, i.e., Kaiser and Borsari told Plaintiff she was terminated because they heard fourth-hand that her husband asked a hotel bartender where he could purchase drugs. These facts alone are enough to satisfy the notice pleading standard for wrongful termination in violation of public policy. Although Plaintiff's complaint contains substantially more supporting facts.

Similarly, the Plaintiff has pleaded ample facts that her other claims of Willful Withholding of Wages, Defamation, and Negligent and Intentional Infliction of Emotion Distress, are all facially plausible. Plaintiff purchased components for the Defendants. No one reported to

1 the Plaintiff and Plaintiff reported only to Borsari and/or Kaiser. Plaintiff worked at Defendants'
2
3 Bellingham headquarters during the day and spent her evenings at home on the telephone with
4
5 Chinese component manufacturers. Defendants, though, misclassified her as exempt and
6
7 intentionally failed to pay her for the overtime hours she worked.
8
9

10 Defendants also defamed Plaintiff. First, they recklessly associated her with drug use.
11
12 Based on multi-level hearsay, the Defendants accused Plaintiff's husband of being a drug user and
13
14 implicated the Plaintiff in his alleged drug use. Then, the Defendants told Plaintiff's coworkers
15
16 that she was terminated because she was a "security threat," thereby accusing her of a multitude
17
18 of bad acts from terrorism to betrayal.
19
20

21 To cover up their tax evasion, the Defendants terminated the Plaintiff in the cruelest of
22
23 fashions. After 26 years of dedicated service, she was mercilessly disposed of. They gave her
24
25 nothing. Not a dollar of severance. Rather, they leveled specious and spurious allegations against
26
27 Plaintiff, which had a devastating emotional impact on her.
28
29

30 The Defendants' motion disregards these facts and the plethora of other facts in the
31
32 Plaintiff's extensive complaint. Instead, Defendants allege their own facts while brazenly, and
33
34 falsely, attributing them to the Plaintiff's complaint. Then, Defendants erroneously contend that
35
36 the Plaintiff must argue sufficient facts to satisfy each element of her claims. Plaintiff, therefore,
37
38 respectfully requests that the Court deny the Defendants' motion in its entirety.
39
40
41

42 On a motion to dismiss, dismissal without leave to amend is improper unless it is clear,
43
44 upon de novo review, that the complaint could not be saved by any amendment, which is certainly
45
46 not the case here. Accordingly, if, in the unlikely event the Court decides Plaintiff has not pled
47

1 enough facts regarding any of her claims, it should permit the Plaintiff to amend her complaint.
2
3 The Defendants even tacitly agree with this because they have not requested the Court to dismiss
4
5 the Plaintiff's claims with prejudice.
6

7 8 **II. STATEMENT OF FACTS**

9 10 **A. The Court Should Only Consider All the Facts Alleged in Plaintiff's Complaint.**

11
12 Plaintiff was a dedicated employee for 26 years. *Complaint*, ¶ 4.1. She purchased
13
14 components from China for use by Altair Advanced Industries, Inc. ("Altair"), which is wholly
15
16 owned by Grace Borsari ("Borsari"). *Id.* ¶ 2.5, 4.6. Alpha Technologies, Inc. ("Alpha"), which is
17
18 wholly owned by Frederick Kaiser ("Kaiser"), sold the products manufactured by Altair. *Id.*
19
20 ¶¶ 2.4, 4.4. Throughout her employment, no one reported to the Plaintiff and Kaiser and/or Borsari
21
22 directed her work for the benefit of Alpha and Altair. *Id.* ¶ 4.9.
23

24
25 Plaintiff effectively reported to Kaiser and Borsari that the Defendants were engaged in
26
27 tax evasion through transfer mispricing. *Complaint*, ¶¶ 4.6-8, 4.13. The Defendants used CPA
28
29 Peter Turnquist in the Bahamas to accomplish their tax fraud. *Id.* ¶ 4.12. In a feigned effort to
30
31 cease transfer mispricing, Kaiser insisted that Plaintiff travel to the Bahamas with him to meet up
32
33 with Turnquist. *Id.* ¶ 4.14-15. Kaiser insisted that the Plaintiff take her husband with her even
34
35 though she did not want him to go because of his medical issues. When entering the Bahamas,
36
37 Kaiser instructed the Plaintiff to inform customs that she and her husband were vacationing. *Id.* ¶
38
39 4.16.
40
41
42
43

44 While in the Bahamas, Plaintiff made changes to the component price list, which could easily
45
46 have been accomplished from Bellingham. *Id.* ¶¶ 4.15-16. At no point while at their hotel in the
47

1 Bahamas, did the Plaintiff or her husband make inappropriate remarks or seek information on where
2
3 to buy illegal drugs. *Id.* ¶ 4.17.
4

5 On Wednesday, Plaintiff met with Kaiser and Borsari. *Complaint.* ¶ 4.18. Kaiser told the
6
7 Plaintiff she was terminated because her husband tried to buy drugs from the hotel bartender in the
8
9 Bahamas. *Id.* Kaiser said Turnquist was told by someone, who was told by someone, who was told by
10
11 the bartender. Plaintiff said the accusation was false and Kaiser responded “you’re married to him so
12
13 it’s at your doorstep.” Plaintiff said to Borsari “and you believe this, after 26 years” and she responded
14
15 “I guess.” *Id.* It was later reported to Plaintiff that Kaiser informed employees that Plaintiff was
16
17 terminated because she was a “security threat.” *Id.* ¶ 4.20.
18
19
20

21 **B. The Court Should Strike or Disregard New Facts Alleged by the Defendants.**
22

23 The Court should strike the facts alleged by the Defendants, which they have tried to
24
25 sneak in through intentionally mis-citing the Plaintiff’s complaint by using “*id.*” For example,
26
27 none of the following alleged facts are in the Plaintiff’s complaint:
28
29

- 30 1. Plaintiff was a senior international buyer. *Defs’ Motion*, p.1:17;
31
- 32 2. Plaintiff worked for Alpha. *Defs’ Motion*, p.1:17;
33
- 34 3. Peter Turnquest “is a prominent public figure in the Bahamas...and an important Alpha
35
36 business partner.” *Defs’ Motion*, p.1:19-21;
37
- 38 4. Shortly after Plaintiff’s trip to the Bahamas, Turnquest reached out to Fred Kaiser,
39
40 Alpha’s CEO, regarding conduct by Plaintiff and her husband during the trip that had
41
42 greatly upset Turnquest. The conduct at issue involved Plaintiff and her husband at a
43
44 hotel bar. *Defs’ Motion*, p.21-23;
45
46
47

- 1 5. Turnquest reported to Kaiser that after Plaintiff told people at the bar that she was in
2 the Bahamas to meet with Turnquest on business – her husband had asked the hotel
3 bartender where he could buy drugs. Because Turnquest is prominent local figure, he
4 feared that Plaintiff’s conduct would damage his reputation. That concern was
5 heightened because the incident had been relayed to multiple people before reaching
6 Turnquist’s attention. *Defs’ Motion*, pp.1-2:24-4;
7
8 6. Kaiser believed that Plaintiff’s conduct reflected poorly on Alpha, had potentially
9 damaged Alpha’s relationship with a business partner, and demonstrated an
10 unacceptable lack of discretion and judgment by Plaintiff. *Defs’ Motion*, p.2:6-8;
11
12 7. Kaiser also explained that the matter had damaged Alpha’s relationship with
13 Turnquest and Kaiser’s understanding was that Turnquest did not want to have
14 anything further to do with Plaintiff. *Defs’ Motion*, p.2:12-13;
15
16 8. Kaiser informed Plaintiff that as a result of this incident, Turnquist would not work
17 with Plaintiff in the future. *Defs’ Motion*, p.13:16-17;
18
19 9. Alpha received a report that she and her husband had attempted to purchase illegal
20 drugs and damaged a relationship with a business partner while on a business trip to
21 the Bahamas. *Defs’ Motion*, p.20:10-12.
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40 III. STATEMENT OF ISSUES

- 41
42 1. Does the Plaintiff’s extensive complaint: 1) contain short and plain statements of her
43 claims showing that she is entitled to the relief she seeks; and 2) allege ample facts that would
44 allow the Court to reasonably infer that the Defendants are liable for Plaintiff’s claims? **Yes.**
45
46
47

1 2. If the Court were to find Plaintiff failed to properly plead some or all of her claims, should
2
3 the Court grant Plaintiff leave to amend the complaint? **Yes.**
4

5 **IV. AUTHORITY AND ARGUMENT**

6 **A. The Plaintiff's Complaint Satisfies Fed. R. Civ. P. 8.**

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8
9
10 Complaints need only allege facts with sufficient specificity to notify defendants of
11
12 plaintiff's claims. *Balderas v. Countrywide Bank, N.A.*, 664 F.3d 787, 790 (9th Cir. 2011)
13
14 (reversing dismissal). So long as the plaintiff alleges facts to support a theory that is not facially
15
16 implausible, the court's skepticism is best reserved for later stages of the proceedings when the
17
18 plaintiff's case can be rejected on evidentiary grounds. *Id.* A complaint containing allegations
19
20 that, if proven, present a winning case is not subject to dismissal under 12(b)(6), no matter how
21
22 unlikely such winning outcome may appear to the district court. *Id.* at 791.
23
24

25
26 There is a strong policy underlying the Federal Rules of Civil Procedure favoring
27
28 decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986) (citing 6 Moore's
29
30 Federal Practice ¶ 55-05[2], at 55-24 to 55-26)). Fed. R. Civ. P. 8(a)(2) requires only "a short and
31
32 plain statement of the claim showing that the pleader is entitled to relief" in order to "give the
33
34 defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic*
35
36 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Specific facts are unnecessary. *Erickson v. Pardus*,
37
38 551 U.S. 89, 93 (2007). A complaint passes the *Twombly* plausibility test if it alleges enough facts
39
40 to raise a reasonable expectation that discovery will reveal evidence of illegality, *Twombly*, 550
41
42 U.S. at 556, i.e., enough facts that the court can draw the reasonable inference that the defendant
43
44 is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009).
45
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1 The Ninth Circuit addressed apparent conflicts between *Twombly* and *Iqbal* and other
2 recent Supreme Court pleading precedent, and distilled two undisputed principles: First, to be
3 entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply
4 recite the elements of a cause of action, but must contain sufficient allegations of underlying facts
5 to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual
6 allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not
7 unfair to require the opposing party to be subjected to the expense of discovery and continued
8 litigation. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

9 “[D]etermining whether a complaint states a plausible claim for relief will . . . be a
10 context-specific task that requires the reviewing court to draw on its judicial experience and
11 common sense.” *Iqbal*, 556 U.S. at 678-79. In other words, the height of the pleading requirement
12 is relative to circumstances. *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (discussing
13 *Iqbal* and *Twombly*). For example, *Twombly* involved a claim with the complex elements of an
14 antitrust conspiracy claim, requiring more extensive factual allegations to establish “plausibility.”
15 In contrast, few essential facts are required to plead simpler claims, such as Plaintiff’s claims of
16 wrongful termination, employee misclassification, defamation, and emotional distress.

17 Circuit Court decisions that have analyzed the *Iqbal* standard reveal that no revolutionary
18 “sea change” in federal civil procedure has occurred. *See, e.g., Moss v. U.S. Secret Serv.*, 572 F.3d
19 962, 968 (9th Cir. 2009). After *Iqbal*, the Court of Appeals for the D.C. Circuit continues to state
20 ““that a judge must accept as true all of the factual allegations contained in the Complaint.””
21 *Atherton v. Dist. of Columbia Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (quoting

1 *Erickson*, 551 U.S. at 94. “A court may not grant a motion to dismiss for failure to state a claim
2
3 ‘even if it strikes a savvy judge that . . . recovery is very remote and unlikely.’” *Atherton*, 567
4
5 F.3d at 681 (quoting *Twombly*, 550 U.S. at 556).
6

7
8 By these standards, Plaintiff has more than met her burden. Her complaint is very detailed
9
10 and alleges numerous facts that if true state plausible claims of wrongful termination in violation
11
12 of public policy, misclassification as exempt, defamation, and emotional distress.
13

14
15 The Defendants’ Motion before the Court, though, attempts to impose on Plaintiff an
16
17 inappropriate evidentiary burden at the pleadings stage by arguing that Plaintiff must establish
18
19 each element of her claims through evidentiary support. However, the motion cites no authority
20
21 for the proposition that Plaintiff must establish each element of her claim without even
22
23 conducting discovery. This is because the rule is much simpler, and the complaint satisfies the
24
25 “short and plain statement” requirement under Fed R. Civ. P. 8 and the decisions interpreting it.
26
27 The Court should deny the Motion because the complaint as written satisfies the notice pleading
28
29 standard with regard to all claims.
30
31

32
33 **B. Plaintiff Has Alleged Enough Facts to State a Plausible Claim of Wrongful**
34 **Termination in Violation of Public Policy.**
35

36 1. Plaintiff was employed by all four Defendants.
37

38
39 Nearly all federal and state laws confirm that Borsari, Kaiser, Altair, and Alpha were
40
41 Plaintiff’s employer. RCW 49.60.040(11) states in relevant part, an “employer includes any
42
43 person acting in the interest of an employer, directly or indirectly...” Employer “includes any
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45 individual, partnership, association, corporation, business trust, or any person or group of persons
46
47 acting directly or indirectly in the interest of an employer in relation to an employee.” RCW

1 49.46.010(4). Title VII of the Civil Rights Act states in relevant part, “employer means a
2 person...and any agent of such a person. 42 U.S.C. §2000(e).
3
4

5 The Fair Labor Standards Act defines an employer to include “any person acting directly
6 or indirectly in the interest of an employer in relation to an employee. 29 U.S.C. §203(d). The
7 state law analogue, the Washington Minimum Wage Act, also states in relevant part that an
8 employer “includes any individual, partnership, association, corporation, business trust, or any
9 person or group of persons acting directly or indirectly in the interest of an employer in relation to
10 an employee.” RCW 49.46.010(4). The definition of ‘employer’ under the FLSA is to be given an
11 expansive interpretation in order to effectuate the FLSA's broad remedial purposes.” *Becerra v.*
12 *Expert Janitorial, LLC*, 176 Wn.App. 694, 704 n.18, 309 P.3d 711 (2013) (citing *Bonnette v.*
13 *California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983)).
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26 Even the regulations accompanying the Family Medical Leave Act refer to the definitions
27 outlined in the FLSA as follows: “An employer includes any person who acts directly or
28 indirectly in the interest of an employer to any of the employer's employees. 29 C.F.R. §825.104
29 (referring itself to the definition of employer in section 3(d) of the Fair Labor Standards Act
30 (FLSA), 29 U.S.C. § 203(d)). The Washington Family Medical Leave Act also defines an
31 employer as “[a]ny person, firm, corporation, partnership, business trust, legal representative, or
32 other business entity which engages in any business, industry, profession, or activity in this state.”
33 RCW 49.78.020(5). Significantly, Defendants’ motion fails to mention any of these many
34 statutory definitions.
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1 When applying these statutory definitions to the facts alleged in Plaintiff's complaint,
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3 Plaintiff has satisfied her burden that all of the Defendants were her employer. The Court must
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5 take as true that Borsari and Kaiser directed the Plaintiff at all times; Plaintiff reported to no one
6
7 else and only these two people. Borsari and Kaiser directed Plaintiff to purchase components for
8
9 Altair to manufacture products to be sold by Alpha. Borsari and/or Kaiser directed Plaintiff
10
11 regarding invoicing and Turnquist regarding transfer mispricing. When Plaintiff discovered what
12
13 amounted to tax evasion, Borsari and Kaiser were on the conference call with Plaintiff and
14
15 Turnquist. At the termination meeting, Kaiser related the decision and Borsari verbally agreed.
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17 These, with the other "whole picture" facts in the complaint, make it reasonable for the Court to
18
19 infer that Borsari and Kaiser were acting directly or indirectly in the interest of Alpha and Altair
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21 in relation to Plaintiff. Further, Borsari and Kaiser are owners/officers/agents of Altair and Alpha.
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26 Defendants completely ignore the facts in the Plaintiff's complaint and ask the Court to
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28 believe their new facts. For example, although the Plaintiff's complaint states that she purchased
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30 components for Altair and Borsari, the Defendants say that Plaintiff was employed by Alpha.
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32 Further, Plaintiff's facts section has 21 paragraphs and spans 7 pages, yet the Defendants argue
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34 that Plaintiff is relying only on paragraph 4.21 to support her assertion that all of the Defendants
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36 were her employer. The Court must reject the Defendants' illegitimate strategy and take all of the
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38 facts alleged by the Plaintiff as true.
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42 The Washington Supreme Court has recognized that supervisory personnel can be sued
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44 under the theory of wrongful discharge. *Smith v. Bates Technical College*, 139 Wn.2d 793, 799,
45
46 991 P.2d 1135 (2000). A claim for a wrongful discharge in violation of public policy is an
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1 intentional tort. *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 230-231, 193 P.3d 128
2
3 (2008) (*citing Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 74, 821 P.2d 18
4
5 (1991). Other than piercing the corporate veil, corporate officers may face personal liability for
6
7 tortious conduct. *Consulting Overseas Management, Ltd v. Shtikel*, 105 Wn.App. 80, 84, 18 P.3d
8
9 1144 (2001). The Washington Supreme Court have imposed personal liability on officers actively
10
11 participating and assisting the agent's principal in the tort. *Consulting Overseas Management*, 105
12
13 Wn.App. at 84. An employee or agent is personally liable to a third party injured by his or her
14
15 tortious conduct, even if that conduct occurs within the scope of employment or agency.
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17 *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash.2d 380, 400, 241 P.3d 1256 (2010);
18
19 Restatement (Third) of Agency § 7.01 (2006). Additionally, in the statutory employment
20
21 discrimination context, it is well-settled that supervisors can be held individually liable for their
22
23 discriminatory conduct. *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 361, 20 P.3d 921
24
25 (2001). Accordingly, Kaiser and Borsari are not only liable to Plaintiff as her employers, but also
26
27 as supervisors, agents, and corporate officers.
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33 Defendants' reliance on *Awana v. Port of Seattle*, 121 Wn.App. 429, 433, 89 P.3d 291
34
35 (2004) is misplaced and misguided and easily distinguished from this case. *Awana* involved a
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37 Plaintiff who was an employee of a contractor hired by the Port of Seattle. The Court properly
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39 dismissed claims against the Port reasoning that the Port was not a proper employer because the
40
41 hiring and firing authority laid with the contractor. Unlike *Awana*, here, there is no contractor-
42
43 subcontractor relationship. Altair and Alpha both employed Plaintiff because she performed
44
45 duties for both companies at the direction of their owners, Borsari and Kaiser. Further, unlike
46
47

1 *Awana*, here all four Defendants qualify as employers pursuant to multiple federal and
2
3 Washington state statutes.
4

5 Defendants' reliance on *MacDonald v. Grace Church Seattle*. No. C05-0747C, 2006 WL
6
7 1009283, at *2 (W.D. Wash. Apr. 14, 2006) (Coughenour, J.) is equally misplaced, misguided,
8
9 and distinguishable from this case. The Court in *MacDonald*, relying on the *Awana* decision
10
11 emphasized the "importance of a party's control over the employment of the complaining worker.
12
13 *MacDonald*, at *2 (citing *Awana v. Port of Seattle*, 89 P.3d at 293). In *MacDonald*, Defendant
14
15 Grace Church Seattle – while having affiliations and "support" from the Defendant entities
16
17 PNWP and PCA – was the only entity with direct control over MacDonald's employment terms
18
19 and conditions. Hence, PNWP and PCA were not proper employers. This holding is consistent
20
21 with Plaintiff's position that all four of the Defendants were Plaintiff's employer because Kaiser
22
23 and Borsari had at all times direct control over her employment terms and conditions. One last
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25 point for the Court to take into consideration is that both *Awana* and *McDonald* involved motions
26
27 for summary judgment and not motions to dismiss.
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32
33 2. Defendants wrongfully terminated Plaintiff's employment.
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35 The Washington Supreme Court has recognized the wrongful discharge in violation of
36
37 public policy tort generally in four different situations: (1) where employees are fired for refusing
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39 to commit an illegal act; (2) where employees are fired for performing a public duty or obligation,
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41 such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege,
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43 such as filing workers' compensation claims; and (4) where employees are fired in retaliation for
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1 reporting employer misconduct *Becker v. Community Health Systems, Inc.*, 184 Wn.2d 252, 258-
2
3 259 (2015)(citing *Gardener v. Loomis Armored Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996)).
4

5 Plaintiff's claim against Defendants for wrongful discharge falls squarely into the fourth
6
7 situation – she was fired in retaliation for reporting another elaborate and clandestine attempt by
8
9 the Defendants to commit tax fraud; the same offense Defendants were penalized for in 2004 by
10
11 this very Court. Plaintiff's complaint lays out many facts, which when taken as true support a
12
13 claim for wrongful termination that is facially plausible, e.g. 1) when Plaintiff reported the tax
14
15 fraud to Kaiser, he immediately instructed Plaintiff not to put anything in writing; 2) Plaintiff was
16
17 forced to take an unnecessary trip to the Bahamas and lie to officials about the reason for the visit;
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19 and 3) Plaintiff was terminated for multiple reasons each as ridiculous as the other (which
20
21 supports a finding of pretext).
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25
26 Assuming arguendo that Plaintiff's claim against Defendants does not properly fit into the
27
28 fourth situation, the four-factor analysis yields the same result. In order for Ms. Bailey to prevail
29
30 on her claim she would need to prove the following elements: 1) the existence of a "clear public
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32 policy" (clarity element), (2) whether "discouraging the conduct in which [the employee] engaged
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34 would jeopardize the public policy" (jeopardy element), (3) whether the "public-policy-linked
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36 conduct caused the dismissal" (causation element), and (4) whether the employer is "able to offer
37
38 an overriding justification for the dismissal" (absence of justification element). *Becker v.*
39
40 *Community Health Systems, Inc.*, 184 Wn.2d 252, 259 n.3, 359 P.3d 746 (2015) (citing Henry H.
41
42 Perritt, Jr., *Workplace Torts: Rights and Liabilities* § 3.7 (1991)). *Rose v. Anderson Hay and*
43
44
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1 *Grain Co.*, 184 Wn.2d 268, 277, 358 P.3d 1139 (2015); and *Rickman v. Premera Blue Cross*, 184
2 Wn.2d 300, 358 P.3d 1153 (2015).
3
4

5 Plaintiff's complaint alleges many facts that satisfy the Plaintiff's burden here. For
6
7 example, first, it is unquestionable that there is a clear public policy against the commission of tax
8 fraud. *Complaint*. ¶4.5 ("Alpha Technologies, Inc. and G.B. Enterprises pled guilty to tax
9 fraud."). Second, discouraging Ms. Bailey and other employees from reporting tax fraud would
10 jeopardize this important and serious public policy. *Id.* ¶4.13 ("Plaintiff hoped that by reporting
11 this potential tax fraud to Mr. Kaiser that he would take steps to remedy the situation and make
12 the Defendants tax compliant"). Third, reporting this conduct caused Ms. Bailey' dismissal, i.e.
13 shortly after reporting tax fraud she was terminated. *Id.* ¶4.19 ("Mr. Kaiser told Plaintiff she was
14 terminated"). Fourth, Defendants gave no overriding justification for Plaintiff's termination. *Id.* ¶¶
15 4.18-19. Defendants' varying reasons are nonsensical, e.g. "Mr. Kaiser said Mr. Turnquist was
16 told by someone, who was told by someone, who was told by the bartender." Further, multiple
17 reasons for termination is evidence of pretext. *Rice v. Offshore Systems, Inc.* 167 Wn.App. 77, 91,
18 272 P.3d 865 (2012) (citing *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 624, 60 P.3d
19 106 (2002) (Evidence indicating that the employer offered multiple, incompatible reasons or
20 inconsistent reasons for the adverse action and rebutting the accuracy or believability of the
21 employer's reasons is sufficient to create competing inferences.)).
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42 Accordingly, Plaintiff has pleaded sufficient facts that would allow the Court to draw a
43 reasonable inference that she is entitled to relief for being wrongfully terminated. Even if,
44 however, the Court is skeptical, it's skepticism is best reserved for later stages of the proceedings
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1 when the plaintiff's case can be rejected on evidentiary grounds. *Balderas v. Countrywide Bank*,
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3 *N.A.*, 664 F.3d 787, 790 (9th Cir. 2011) (“[a]nd the time for presenting evidence has not yet
4
5 arrived”); *see also Alvarez v. Hill*, 518 F.3d 1152, 1157-1158 (9th Cir. 2008) (“this simplified
6
7 notice pleading standard relies on liberal discovery rules and summary judgment motions to
8
9 define disputed facts and issues and to dispose of unmeritorious claims.”). A complaint containing
10
11 allegations that, if proven, present a winning case is not subject to dismissal under 12(b)(6), no
12
13 matter how unlikely such winning outcome may appear to the district court. *Balderas*, 664 F.3d at
14
15 791.
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18
19 **C. Plaintiff Has Alleged Enough Facts to State a Plausible Claim of Failure to Pay**
20 **Wages in Violation of Federal and Washington State Wage Laws.**
21

22 Under both the Minimum Wage Act (“MWA”) and the Fair Labor Standards Act
23
24 (“FLSA”), employers must pay non-exempt employees at a rate of one and one-half times the
25
26 employee’s regular rate for hours worked in excess of forty hours per week. RCW 49.46.120; 29
27
28 U.S.C. §207.
29
30

31 In *Landers v. Quality Communications, Inc.*, 771 F.3d 638 (9th Cir. 2014) the Court held
32
33 that a plaintiff may establish a plausible wage claim several ways: by estimating the length of her
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35 average workweek during the applicable period and the average rate at which she was paid, the
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37 amount of overtime wages she believes she is owed, *or any other facts that will permit the court*
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39 *to find plausibility* (Emphasis Added). *Id.* at 644-45. Notably, though, the Court declined to make
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41 the approximation of overtime hours as the essential component in determining whether an FLSA
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43 claim was plausible by reasoning that, “[a]fter all, most (if not all) of the detailed information
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45 concerning a plaintiff-employee's compensation and schedule is in the control of the defendants.”
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47

1 *Id.* at 645. This holding makes perfect sense. Here the Plaintiff does not have detailed information
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3 regarding her compensation. This is information she will obtain through discovery.
4

5 *Landers* is factually distinguishable from the instant case.¹ There, the complaint made
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7 general allegations asserting violations. For example, the complaint alleged that Plaintiff was
8
9 entitled to a minimum wage and an overtime hourly wage of one-half his regular hourly wage for
10
11 all hours worked in excess of forty hours per week. *Landers*, 771 F.3d at 646. Notably absent was
12
13 any detail regarding a given workweek or that Landers had worked in excess of forty hours. *Id.*
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17 Here, Plaintiff worked at the Bellingham office during the day and from home at night.
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19 Plaintiff spent hours on the telephone every evening. She was on-call 24/7. Plaintiff even worked
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21 on Christmas Day. *Complaint*. ¶4.9. These facts allow the Court to reasonably draw the inference
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23 that she consistently and constantly worked in excess of forty hours a week. While Plaintiff did
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25 not specifically say she worked in excess of 40 hours per week, suffice to say if she worked at the
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27 Defendants' Bellingham headquarters all day and then spent the evening purchasing components
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29 from China she must have worked in excess of 8 hours a day and 40 hours per week. Certainly,
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31 these facts will permit the Court to find plausibility.
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35 RCW 49.52.050 provides that employers may not willfully and with intent deprive the
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37 employee any part of his or her wages. Here, the Defendants admit that they classified the
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39 Plaintiff as exempt and directed her to work in excess of 40 hours per week. Thereby, the
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45 ¹ Defendants provide a long string cite of cases in which claims for overtime were dismissed. *See Defs' Motion*
46 at 17, n.5. All these cases are wholly inapplicable here as most of the alleged facts at issue contained bare
47 conclusory allegations. *See e.g. Wright v. N. Am. Terrazo*, No. C12-2065JLR, 2013 WL 441517, at *3 (W.D.
Wash. Feb 5, 2013 (Robart, J) ("Mr. Wright's only fact was that he was "unreasonably den[ied] overtime pay.")

1 Defendants intentionally and willfully failed to pay Plaintiff's overtime wages. *Complaint* ¶¶ 1.3,
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3 4.9, 4.10.
4

5 **D. Plaintiff Has Alleged Enough Facts to State a Plausible Claim of Defamation.**
6

7 The Ninth Circuit has held that a defamation claim satisfies the pleading standards of Rule
8
9 8 where the allegations identify the substance of the allegedly defamatory statements and the time
10 and place in which they were made. *See Flowers v. Carville*, 310 F.3d 1118, 1131 (9th Cir. 2002)
11 (plaintiff stated sufficient defamation claim where complaint "list [ed] the precise statements
12 alleged to be false and defamatory, who made them and when."); *see also Nixon v. Franciscan*
13 *Health System*, Case No. C11-5076BHS, 2011 WL 1772587 (W.D. Wash. May 10, 2011) (Settle,
14 J) (denying 12(b)(6) dismissal of defamation counterclaim).
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23 Plaintiff's complaint states that at her termination on Wednesday, August 26, 2015, Kaiser
24 and Borsari falsely accused the Plaintiff's husband of trying to purchase drugs at the hotel bar
25 while he accompanied her on a business trip. When Plaintiff disputed the false allegation Kaiser
26 added, "You're married to him so it's at your doorstep." When Plaintiff asked Borsari if she
27 agreed with the allegation, Borsari responded, "I guess so." Thus, Defendants accused the
28 Plaintiff of being a drug user or of being married to/associated with a drug user. Defendants
29 effectively accused Plaintiff of using drugs along with her husband or acquiescing to his drug use.
30 Defendants' false allegation is undoubtedly defamatory.
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42 Further, soon after Plaintiff's termination, Plaintiff was informed that Kaiser, in his
43 capacity as sole owner and CEO of Alpha falsely informed employees that Plaintiff was
44 terminated because she was a "security threat." Kaiser did not say Plaintiff was terminated
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1 because she and/or her husband tried to purchase drugs on a business trip. Kaiser's statement
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3 illustrates an intent to up the ante and accuse the Plaintiff of more sinister, damaging, illegal, and
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5 harmful conduct. Effectively, Kaiser accused the Plaintiff of a multitude of crimes under the
6
7 umbrella of "security threat."
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10 As the sole owner and CEO of Alpha, Kaiser speaks on its behalf. Similarly, as the sole
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12 owner and CEO of Altair, Borsari speaks on its behalf. Any argument otherwise belies not only
13
14 reason, but, more importantly, the law. The defamatory statements made by Kaiser and Borsari
15
16 were, therefore, also made by Alpha and Altair. Accordingly, these facts satisfy the pleading
17
18 standards of Rule 8 for a defamation claim and an inference could be made that all Defendants
19
20 were at fault.
21
22

23 Defendants also have no qualified or conditional privilege that in any way reflects the
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25 privileges set forth in the cases they cite. *See Messerly v. Asameria Minerals Inc.*, 55 Wn. App.
26
27 811 (1989) (privilege existed as company had interest in deterring drug use in the company);
28
29 *Lawson v. Boeing Co.*, 58 Wn. App. 261, 266, 792 P.2d 545 (1990) (privilege existed as company
30
31 had interest in deterring sexual harassment); *Castello v. City of Seattle*, No. C10-1457 MJP, 2011
32
33 WL 633038 at *3 (W.D. Wash. Dec. 19, 2011) (Pechman, J.) (privilege existed as statements
34
35 were communicated to public officer and made during investigation). Here, Defendants did not
36
37 issue a memorandum to employees saying Plaintiff was terminated for trying to buy drugs, so
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39 their statement was not to deter employees from drug use.
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44 While *Doe v. Gonzaga University*, 143 Wn.2d 687, 24 P.3d 390 (2001) stands for the
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46 proposition that a qualified privilege may exist between co-employees, that privilege may also be
47

1 lost if the employees are not acting in the ordinary course of their work. *Doe*, 143 Wn. at 703.
2
3 Further, the privilege may also be lost by showing that the defendant made the statement with
4
5 actual malice. *Id.* (citing *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 530-31, 730 P.2d 1299
6
7 (1987)). Here, Defendants' statements were not between co-workers and were malicious. As
8
9 employers, Defendants first terminated her for alleged drug use. Then, as employers, they
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11 informed employees that Plaintiff was a security threat," thereby implicating her in sinister,
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13 damaging, illegal, and harmful conduct.
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17 Hence, Plaintiff's defamation claim satisfies the pleading standards of Rule 8 because her
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19 allegations identify the substance of the allegedly defamatory statements and the time and place in
20
21 which they were made.
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23
24 **E. Plaintiff Has Alleged Enough Facts to State a Plausible Claim of Intentional**
25 **Infliction of Emotional Distress.**
26

27 The Washington State Supreme Court has held that in order to state a claim for intentional
28
29 infliction of emotional distress, plaintiff must allege (1) that defendant engaged in extreme and
30
31 outrageous conduct, (2) that it intentionally or recklessly inflicted emotional distress, and (3) that
32
33 plaintiff suffered severe emotional distress as a result of defendant's conduct. *Kloepful v. Bokor*,
34
35 149 Wn.2d 192, 195, 66 P.3d 630 (2003) (citing *Reid v. Pierce County*, 136 Wash.2d 195, 202,
36
37 961 P.2d 333 (1998)). These elements were adopted by the Washington Supreme Court from the
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39 Restatement (Second) of Torts § 46 (1965) in *Grimsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d
40
41 291 (1975).
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45 In *Dicomes v. State.*, 113 Wn.2d 612, 782 P.2d 1002 (1989) the "outrageous" conduct
46
47 alleged involved a privately delivered termination letter and responding to media inquiries. While

1 a discharge itself is not sufficient to support a claim for intentional infliction of emotional
2
3 distress, the *Dicomes* Court further held that “[i]t is the manner in which a discharge is
4
5 accomplished that might constitute outrageous conduct.” *Dicomes*, 113 Wn.2d at 630.
6

7
8 Unlike *Dicomes*, Plaintiff was the victim of an outrageous discharge. After 26 years of
9
10 dedicated service, Plaintiff was kicked to the curb because she reported Defendants’ illegal tax
11
12 evasion. To cover their fraud, in firing Plaintiff they recklessly made false and deceitful
13
14 statements about her being a drug user, or being associated with a drug user, and a security threat.
15
16 Defendants’ actions devastated the Plaintiff and have had a tremendous negative emotional
17
18 impact on her life. These facts, considered along with other facts illustrating the lengths the
19
20 Defendants went to to dispose of the Plaintiff, provide the Court with a plausible claim of
21
22 intentional infliction of emotional distress.
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25
26 **F. Plaintiff Has Alleged Enough Facts to State a Plausible Claim of Negligent Infliction**
27 **of Emotional Distress.**
28

29
30 Washington courts have allowed claims for emotional distress in the absence of physical
31
32 injury where the emotional distress is within the scope of foreseeable harm of the negligent
33
34 conduct. *Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 561, 293 P.3d 1168 (2013) (citing
35
36 *Hunsley v. Giard*, 87 Wash.2d 424, 433, 436, 553 P.2d 1096 (1976)). Claims for negligent
37
38 infliction of emotional distress are analyzed under the established concepts of duty, breach,
39
40 proximate cause, and damages. *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35
41
42 P.3d 1158 (2001).
43
44

45
46 In Washington, the scope of foreseeable harm of a given type of conduct “depends on
47
mixed considerations of logic, common sense, justice, policy and precedent.” *Bylsma v. Burger*

1 *King Corp.*, 176 Wn.2d at 561 (citing *King v. City of Seattle*, 84 Wash.2d 239, 250, 525 P.2d 228
2
3 (1974)). Washington courts have found Defendants' conduct was within the scope of foreseeable
4
5 harm in numerous instances.
6

7
8 In *Snyder*, the Court declined to find that a cognizable negligent infliction of emotional
9
10 distress reasoning that the utility of permitting employers to handle workplace disputes outweighs
11
12 the risk of harm to employees who may exhibit symptoms of emotional distress. *Snyder*, 145
13
14 Wn.2d at 245 (2001). However, in narrow instances, such as here, where the conduct involves
15
16 something other than a termination, a claim for negligent infliction of emotional distress can be
17
18 maintained. See *Chea v. Men's Wearhouse, Inc.* 85 Wn.App. 405, 932 P.2d 1261 (1997)
19
20 (involving intentional harassment and did not involve employer-related conduct).
21
22

23
24 Here, the Complaint's facts show that Defendants' engaged in a termination that exceeds
25
26 one would consider a regular "workplace dispute." As the facts addressed *infra* at Section G,
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28 Defendants breached a duty of due care to Plaintiff. This is not the type of conduct even the
29
30 *Snyder* Court would contemplate be covered under what an employer normally handles regarding
31
32 workplace disputes.
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36 Defendants' arguments that Plaintiff must also show that the emotional distress is
37
38 "manifested by objective symptoms" and that is "susceptible to medical diagnosis and proved
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40 through medical evidence" is premature. *Defs' Motion* at 18-19 (citing *Haubry v. Snow*, 106
41
42 Wn.App. 666, 31, P.3d 1186). *Haubry* dealt with a review of summary judgment dismissal. In
43
44 other words, after discovery had been completed, to survive summary judgment dismissal, at least
45
46 some genuine issue of material fact related to whether the emotional distress was "manifested by
47

1 objective symptoms” should have been presented. Based on the lack thereof, the Court granted
2
3 dismissal of this claim.
4

5 At the 12(b)(6) dismissal stage, and viewing the complaint’s facts in a light most favorable
6
7 to Plaintiff, an inference could be drawn that Plaintiff’s emotional distress can be manifested by
8
9 objective symptoms. She was “emotionally devastated” and constantly “worries.” *Complaint*
10 ¶4.22. These facts allow the Court to reasonably draw the inference that Plaintiff is entitled to
11
12 relief for Defendants’ negligent infliction of emotional distress.
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14
15

16
17 **G. Only the Complaint’s Facts and Documents Referenced Should Be Considered.**
18

19 The court typically cannot consider facts beyond what is alleged in the contents of the
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21 complaint. A court in determining the propriety of a Rule 12(b)(6) dismissal generally may not
22
23 look beyond the complaint for additional facts.² *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
24 2006)); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see also Hal Roach Studios*
25 *Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). In Defendants’ Motion
26 to Dismiss, they attempt to sneak facts before the Court that are not contained within the
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28 complaint nor contained in documents referenced in the complaint. Plaintiff respectfully requests
29
30 the Court to disregard the new facts Defendants allege in their motion. *See Statement of Facts*,
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43 ² A court may, however, consider certain materials—documents attached to the complaint, documents
44 incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to
45 dismiss into a motion for summary judgment.” *see Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.
46 2001). *see also* Fed. R. Evid. 201. The parties agree that Defendants’ motion to dismiss should not be converted
47 to a motion for summary judgment, even though Defendants’ argue as though their motion is a motion for
summary judgment.

1 *infra*. Had Defendants wished to plead such facts, an opportunity was afforded to them in their
2
3 answer to Plaintiff's complaint.
4

5 **H. Defendants Improperly Conflate the Standard for Dismissal Under Fed. R. Civ. P 56**
6 **with Fed. R. Civ. P. 12(b)(6).**
7

8 A summary judgment standard is markedly different than one on a 12(b)(6) dismissal
9
10 motion. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1087 (9th Cir. 2001) (Summary judgment is
11
12 proper only if there is no genuine issue of material fact) *compare Morley v. Walker*, 175 F.3d 756,
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14 759 (9th Cir. 1999) ("A dismissal for failure to state a claim is appropriate only where it appears,
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16 beyond doubt, that the plaintiff can prove no set of facts that would entitle it to relief.").
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18 Throughout Defendants' Motion, they misapply the 12(b)(6) standard by conflating it with the
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20 Fed. R. Civ. P. 56 summary judgment standard. Defendants essentially argue that Plaintiff must
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22 show that material issues of fact exist as to each element of her claims. Plaintiff, of course, is not
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24 required to meet such a burden for the purposes of this motion.
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27 **I. Even if the Complaint is Somehow Insufficient, the Court Should Grant Leave to**
28 **Amend.**
29

30 1. Granting leave to amend is the proper remedy for insufficient pleadings.
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33 The Court has discretion to grant leave to amend. *Serra v. Lappin*, 600 F.3d 1191, 1200
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35 (9th Cir. 2010). The court should freely give leave to amend where justice so requires. Fed. R.
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37 Civ. P. 15(a)(2). On a motion to amend, the court ascertains the presence of four factors: bad
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39 faith, undue delay, prejudice to the opposing party, and/or futility. *Serra*, 600 F.3d 1191, 1200
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41 (9th Cir. 2010). But on a motion to dismiss, dismissal without leave to amend is improper unless
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43 it is clear that the complaint could not be saved by any amendment. *Maya v. Centex Corp.*, 658
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1 F.3d 1060, 1072 (9th Cir. 2011) (reversing dismissal without leave to amend). This is so even if
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3 no request to amend the pleading was made. *Doe v. U.S.*, 58 F.3d 494, 497 (9th Cir. 1995)
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5 (holding dismissal without leave to amend was abuse of discretion where district court made no
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7 findings regarding futility of amendment).
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10 2. No court holds that dismissal with prejudice is appropriate in these circumstances.
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12 The Defendants have not cited any reasons to support dismissal with prejudice. Further,
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14 far and away the preferred practice is to allow an amended pleading. In *Iqbal* for instance, the
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16 case was remanded so the plaintiff could seek leave to amend. *Iqbal v. Ashcroft*, 574 F.3d at 822.
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18 In *Twombly*, the complaint had already been amended at least once. *Twombly*, 313 F.Supp.2d 174,
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20 176 (S.D.N.Y. 2003), aff'd by 550 U.S. 544 (2007). The district court's decision did not specify
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22 whether dismissal was with prejudice or not, *Id.* at 189, and the Supreme Court remanded without
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24 any discussion of whether leave to amend was appropriate. *Twombly*, 550 U.S. at 570.
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28 Here, Defendants do not make a substantive argument as to how an amended complaint
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30 would be futile, and because of that, if the Court so desires, leave to amend should be granted
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32 with "extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.
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34 2001). As the Ninth Circuit has repeatedly stated, "'Dismissal without leave to amend is improper
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36 unless it is clear, upon de novo review, that the complaint could not be saved by any
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38 amendment.'" *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002) (quoting *Polich v.*
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40 *Burlington Northern, Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991)).
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V. CONCLUSION

For the foregoing reasons, Ms. Bailey respectfully asks this Court to deny Defendants' Motion to Dismiss or grant her leave to amend her complaint.

RESPECTFULLY SUBMITTED this 5th day of July, 2016.

/s/ Patrick L. McGuigan
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CERTIFICATE OF SERVICE

I hereby declare that on July 5, 2016 I caused the foregoing document to be served on the parties listed below in the manner indicated:

Kevin J. Hamilton William B. Stafford Tobias S. Piering Perkins Coie LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101-3099 <i>Attorneys for Defendants</i>	<input checked="" type="checkbox"/> Via ECF Notification <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. 1 st Class Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email
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DATED this 5th day of July, 2016.

/s/ Angela Tracy

Angela Tracy, Legal Assistant